

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

AUG 15 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JEFFREY PATTERSON, a single man,)

Plaintiff/Appellant,)

v.)

THE ARIZONA BOARD OF REGENTS,)

Defendant/Appellee.)

2 CA-CV 2011-0134
DEPARTMENT A

MEMORANDUM DECISION

Not for Publication
Rule 28, Rules of Civil
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20097517

Honorable Paul E. Tang, Judge

AFFIRMED

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Tucson

and

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E C K E R S T R O M, Presiding Judge.

¶1 This appeal concerns a disciplinary action taken by appellee Board of Regents of the University of Arizona (hereafter “the university”), in suspending a student, the appellant Jeffrey Patterson, for one academic year. Patterson contends the university made a legally insufficient finding to establish that he had committed a sexual assault against another student. We affirm for the reasons set forth below.

Factual and Procedural Background

¶2 In October 2008, a female student at the University of Arizona submitted a complaint to the dean of students alleging that Patterson had sexually assaulted her during a party at a fraternity house. The victim stated that she had felt an immediate and unusual effect upon drinking alcohol at the party with Patterson, and she did not remember consenting to the sexual intercourse with him that followed. Instead, she recalled excusing herself to a bathroom to get out of a room with Patterson and telling him she was very tired and wanted to go home. She also stated that the day after the incident, she had discovered bruises on her legs, and her vagina was very sore where Patterson had bitten her.

¶3 The assistant dean suspended Patterson pending a final decision on his suspected violations of the university’s student code of conduct (“the code”). Relevant to this appeal, Patterson was charged with a violation of § 5-308(F)(2) of the code, which prohibits “[e]ndangering, threatening, or causing physical harm to any member of the university community”; as well as a violation of § 5-308(F)(23) of the code, which prohibits a student from “[e]ngaging in an illegal sexual offense, including but not limited to, sexual assault.” After an investigation that included meetings with Patterson and his

attorney, the assistant dean suspended Patterson for two academic years, citing violations of both subsections, along with one other provision.

¶4 Patterson then appealed to the university's hearing board. The hearing board is an advisory body for the vice president of student affairs, who holds final fact-finding and disciplinary authority. After hearing the testimony of numerous witnesses, the hearing board found Patterson had violated only subsection (23) of § 5-308(F), and it recommended a reduced sanction. The vice president rejected the hearing board's determination in part, finding violations of subsections (2) and (23). But the vice president agreed to reduce Patterson's suspension to one academic year, which was to end in August 2010.

¶5 In September 2009, Patterson filed a complaint in the superior court seeking review of this decision pursuant to the Judicial Review of Administrative Decisions Act (JRADA), A.R.S. §§ 12-901 through 12-914. The superior court affirmed the university's action in an unsigned order filed on October 18, 2010.

¶6 Seven months later, on May 20, 2011, Patterson filed in the superior court a "request for findings of fact and conclusions of law," as well as a "motion for reconsideration." The court accepted the latter motion, finding no express time limit for filing it in either Rule 7.1(e), Ariz. R. Civ. P., or Rule 14, Ariz. R. P. Jud. Review Admin. Decisions. The court then denied the motion for reconsideration and reaffirmed the university's action in an unsigned order filed on July 14, 2011. A week later, on July 22, 2011, Patterson filed a notice of appeal from that order.

¶7 We stayed the appeal and revested jurisdiction in the superior court for the entry of a signed, formal order. *See Eaton Fruit Co. v. Cal. Spray-Chem. Corp.*, 102 Ariz. 129, 130, 426 P.2d 397, 398 (1967). The superior court subsequently entered a signed “judgment” in October 2011, affirming the university’s action and incorporating both of the court’s prior rulings. That judgment is now included in the record on appeal.

Jurisdiction

¶8 Having raised *sua sponte* a question regarding the timeliness of this appeal, *see Anderson v. Valley Union High Sch., Dist. No. 22*, 229 Ariz. 52, ¶ 2, 270 P.3d 879, 881 (App. 2012), and having considered the parties’ supplemental briefs on the issue, we conclude that we have jurisdiction over the present appeal under A.R.S. §§ 12-120.21(A)(1) and 12-913, notwithstanding the one-year delay in obtaining an appealable final order. *See In re Pima Cnty. Juv. Action No. S-933*, 135 Ariz. 278, 280, 660 P.2d 1205, 1207 (1982) (“A final order is one which ends the proceedings, leaving no question open for further judicial action.”).¹ In sum, we agree with both parties that the present appeal technically is premature, *see Comeau v. Ariz. State Bd. of Dental Exam’rs*, 196 Ariz. 102, ¶ 16, 993 P.2d 1066, 1070 (App. 1999), but not fatally delayed.

¹Although the superior court’s 2010 order entirely affirmed the university’s findings and sanction, the order also contained conditional language “remanding th[e] matter . . . for any further proceedings consistent with this Ruling.” This conditional language had no effect, as the parties recognized below. Patterson’s motion for reconsideration acknowledged that “the University ha[d] done nothing” in response to the 2010 order, and the university correctly observed that “there was nothing for the University to do.”

Discussion

¶9 In the university's suspension order, the vice president expressly found Patterson knew the victim "might not have been able to voluntarily consent" to sexual relations due to her alcohol consumption. On appeal, Patterson maintains this finding "was insufficient to find a violation of Section 23 of the Code as a matter of law." Citing A.R.S. §§ 13-1401(5)(b) and 13-1406(A), as well as *State v. Witwer*, 175 Ariz. 305, 856 P.2d 1183 (App. 1993), Patterson contends the sexual assault allegation required proof he knew the victim was incapable of consent. He thus concludes "[t]he Superior Court's affirmance of the findings of violation and suspension are . . . not legally sufficient[,] and the decision of the University should be reversed."

¶10 Notably, Patterson's opening brief challenges only the university's finding (and the superior court's ruling) relating to the "more serious charge" of a sexual assault under subsection (23) of the code. He concedes the finding that he violated subsection (2) of the code by causing physical harm to another student. He simply describes the latter as an "ancillary finding," without discussing it further.

¶11 The university claims that by "ignoring the . . . finding that he physically harmed" the victim, Patterson has "waiv[ed] his argument regarding one of the two bases for his suspension," and he thereby has "concede[d] that the suspension was proper." Cf. *Ariz. Water Co. v. Ariz. Dep't of Water Res.*, 208 Ariz. 147, n.10, 91 P.3d 990, 995 n.10 (2004) (appellate court may affirm superior court's judgment on any basis supported by record); *State v. Aleman*, 210 Ariz. 232, ¶¶ 8-10, 109 P.3d 571, 575 (App. 2005) (failing to address alternative grounds for ruling in opening brief may result in waiver). Patterson

does not address this argument directly in his reply brief, but rather asserts, in passing, and without citing any authority, that the matter should be remanded so the university can determine an appropriate sanction “for this minor violation.”²

¶12 At minimum, an appellant has the duty to identify “the proper standard of review” in the course of developing a legal argument under Rule 13(a)(6), Ariz. R. Civ. App. P. The rule reflects an appellant’s burden to demonstrate error entitling him to relief. *See Guirey, Srnka & Arnold, Architects v. City of Phx.*, 9 Ariz. App. 70, 71, 449 P.2d 306, 307 (1969). It is not incumbent on this court to develop a party’s argument. *See Ace Auto. Prods., Inc. v. Van Duyne*, 156 Ariz. 140, 143, 750 P.2d 898, 901 (App. 1987). Hence, an appellant’s failure to develop and support an argument in an opening brief will result in waiver of an issue on appeal. *See Lohmeier v. Hammer*, 214 Ariz. 57, n.5, 148 P.3d 101, 108 n.5 (App. 2006); *In re \$26,980.00 U.S. Currency*, 199 Ariz. 291, ¶ 28, 18 P.3d 85, 93 (App. 2000).

¶13 Patterson presumes, without citing any authority, that a single legal error should lead us to reverse the university’s action. “But error alone, unless it is structural, does not mandate reversal.” *Monica C. v. Ariz. Dep’t of Econ. Sec.*, 211 Ariz. 89, ¶ 21,

² “[W]e disregard those portions of [a] reply brief . . . not ‘confined strictly to rebuttal of points urged in the appellee’s brief.’” *Sholes v. Fernando*, 228 Ariz. 455, n.2, 268 P.3d 1112, 1114 n.2 (App. 2011), *quoting* Ariz. R. Civ. App. P. 13(c). Because Patterson complains for the first time in his reply brief that “[t]here is no evidence that he hurt [the victim] intentionally,” we do not address the issue. *See Romero v. Sw. Ambulance*, 211 Ariz. 200, n.3, 119 P.3d 467, 471 n.3 (App. 2005). For the same reasons, we decline to consider the request in Patterson’s reply brief that the matter be “remanded . . . for additional proceedings,” as the university was not provided the opportunity to respond to this request in its answering brief.

118 P.3d 37, 42 (App. 2005). And the error complained of here does not approach structural error as it has been defined in *State v. Valverde*, 220 Ariz. 582, ¶¶ 9-10, 208 P.3d 233, 235-36 (2009). *See also Romero v. Sw. Ambulance*, 211 Ariz. 200, n.3, 119 P.3d 467, 471 n.3 (App. 2005) (noting even fundamental error review “should be used sparingly, if at all, in civil cases”), *quoting Williams v. Thude*, 188 Ariz. 257, 260, 934 P.2d 1349, 1352 (1997). Because Patterson has not developed a legal argument showing he is entitled to relief, we therefore find the issue waived on appeal.

¶14 Even if not waived, however, we still would find Patterson’s argument unavailing. Under § 12-910(E), a superior court must “affirm the agency action unless” the record reveals “that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.” *Accord Coplan v. Ariz. State Bd. of Appraisal*, 222 Ariz. 599, ¶ 8, 218 P.3d 1056, 1059 (App. 2009). We then must determine “whether the record contains evidence to support the judgment,” which requires us to “reach the same underlying issues” relating to the agency’s action. *Romo v. Kirschner*, 181 Ariz. 239, 240, 889 P.2d 32, 33 (App. 1995); *see* § 12-913. “When an administrative decision is based on an interpretation of law, we review it *de novo*.” *Saldate v. Montgomery*, 228 Ariz. 495, ¶ 10, 268 P.3d 1152, 1155 (App. 2012). But we do not reweigh the evidence, *St. Joseph’s Hosp. v. Ariz. Health Care Cost Containment Sys.*, 185 Ariz. 309, 312, 916 P.2d 499, 502 (App. 1996), and we apply a deferential standard of review to an agency’s discretionary actions and determinations. *See DeGroot v. Ariz. Racing Comm’n*, 141 Ariz. 331, 335-36, 686 P.2d 1301, 1305-06 (App. 1984); *see also Coplan*, 222 Ariz. 599, ¶ 8, 218 P.3d at 1059.

¶15 If the university had predicated its one-year suspension solely upon Patterson having physically harmed the victim during a night of drinking, in violation of subsection (2) of the code, we would have upheld its action as a lawful exercise of its considerable discretion. When evaluating whether an administrative penalty is excessive, “we review the record to determine whether there has been ‘unreasoning action’” undertaken “‘without consideration and in disregard for facts and circumstances.’” *Petras v. Ariz. State Liquor Bd.*, 129 Ariz. 449, 452, 631 P.2d 1107, 1110 (App. 1981), quoting *Tucson Pub. Schs., Dist. No. 1 of Pima Cnty. v. Green*, 17 Ariz. App. 91, 94, 495 P.2d 861, 864 (1972). Overall, the record here reveals the university thoughtfully exercised its disciplinary authority after a full investigation into the facts and circumstances surrounding the incident.

¶16 Although we might agree with Patterson that the vice president recited an incorrect legal standard in her suspension order, she nevertheless properly found a fact that would support her ultimate decision as to the proper sanction; namely, that Patterson knew the victim might not be capable of consenting to sexual intercourse. Patterson has not disputed the vice president’s authority to find this fact. We acknowledge that the legal question raised by Patterson—whether the facts found by the vice president technically amounted to sexual assault under Arizona law—is pertinent to the question of whether Patterson violated subsection (23). But it arguably is irrelevant to the vice president’s discretionary choice of sanction in a matter of campus discipline and safety. Thus, we would not necessarily reverse the sanction even if we concluded that the subsection (23) violation had not been found properly. *Cf. State v. Martinez*, 210 Ariz.

578, ¶ 27, 115 P.3d 618, 625-26 (2005) (finding single lawful aggravating factor sufficient to support aggravated criminal sentence; consideration of additional factors not reversible error).

¶17 We have not overlooked a non-trivial counterargument that could lend support to Patterson’s position on appeal. A decision predicated on an error of law constitutes an abuse of discretion, *see State v. Mohajerin*, 226 Ariz. 103, ¶ 18, 244 P.3d 107, 108 (App. 2010), and such an error could have altered the university’s calculus in selecting its sanction. *Cf. State v. Johnson*, 229 Ariz. 475, ¶ 20, 276 P.3d 544, 551 (App. 2012) (discussing criminal sentencing errors). But Patterson has not presented or legally supported any argument that he is entitled to the relief he requested—reversal of the vice president’s sanction—based on the arguable error of law that occurred in this administrative context. Moreover, the university has plausibly argued that analogies to criminal sentencing make little sense in the context of academic disciplinary proceedings wherein the procedural standards are more relaxed, the consequences are potentially less severe, and the sanction depends more on a broad assessment of the student’s conduct than the specifics of how many violations that conduct involved. Given the complexity of whether Patterson is entitled to the remedy he has sought, and given his failure to provide legal authority or any analysis supporting his request, we decline to develop his argument and resolve it for him. And we find the application of our waiver rules especially appropriate under the particular circumstances of this case, where an academic suspension has been served fully and where the state specifically raised the topic in its answering brief, yet Patterson failed to respond in his reply.

Disposition

¶18 Patterson has provided us with no meaningful argument that, even if we agreed the university erred in finding one of the bases for his suspension, he would be entitled to reversal. Assuming *arguendo* the superior court erred in affirming the university's finding that Patterson had violated § 5-308(F)(23) of the code, we nonetheless affirm the court's judgment and the university's disciplinary action.

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge